

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
APPENDIX**

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IN THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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UNITED STATES OF AMERICA,

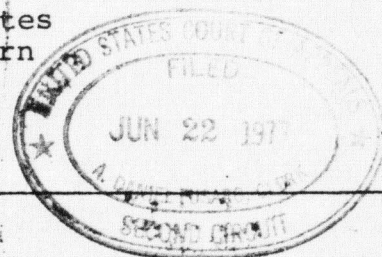
Plaintiff-Appellee,

-VS.-

RAYMOND DAVID WEAN,

Defendant-Appellant.

On Appeal From the United States
District Court for the Eastern
District of New York



APPELLANT'S APPENDIX

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PAGINATION AS IN ORIGINAL COPY

TABLE OF CONTENTS

	<u>PAGE</u>
Docket Entries	1a
Superseding Indictment	5a
Excerpts from Testimony, Summations and Charge to Jury . .	9a
Notice of Appeal	58a

103
DOCKET

75CR 471

NEAUER, J.

TITLE OF CASE	ATTORNEYS
THE UNITED STATES	For U. S.: BEHAR
vs. JOSEPH MASSINO and RAYMOND WEAN	
	For Defendant:
	ROBERT I. WEISWASSER
	32 Court Street
	Brooklyn, N.Y.
Theft of goods in i.c.c.	

ABSTRACT OF COSTS	AMOUNT	CASH RECEIVED AND DISBURSED			
		DATE	NAME	RECEIVED	DISBURSED
Fine,		3/21/77	Notice of Appeal	5	
Clerk,		3/21/77	Paul W. T...		5
Marshal,					
Attorney,					
Commissioner's Court,					
Witnesses,					

DATE	PROCEEDINGS
6-5-75	Before Judd, J - Indictment filed.
6-20-75	Before CATOGGIO, MAG. case called - defts pleaded not guilty - case adjourned to July 15, 1975 at 10:00 A.M.
7-17-75	Before NEAUER, J - case called - deft Massino & counsel Leonard Eisenberg present - deft Wean present without counsel - adjd. to Dec. 15, 1975 at 10:00 a.m.
7/17/75	Notice of readiness for trial filed
7/23/75	Letter from Howard Weiswasser, esq. filed
7/23/75	75 M 432 inserted in CR file.
7/23/75	Notice of Motion filed, ret. 12-15-75, for Inspection.
	directing the production of any wire-tap orders, etc. (rec'd from Chambers and forwarded back to Chambers as directed)

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JCR 471

DATE	PROCEEDINGS
15/75	Before NEAHER, J. - Case called - defts present with counsel case adjd to 4/26/75 at 10:00 A.M. for trial
15-76	Before NEAHER, J - case called - deft & atty Howard Weisswasser present - defts motion to exonerate present bail of \$10,000 surety bond - granted - bail reset at \$25,000 P.R.B. (WEAN)
3-76	Before BRANWELL, J- SUPERSEDING INDICTMENT FILED (MASSINO & WEAN)
19-76	Before NEAHER, J - case called - defts & counsel Weisswasser & Mastropieri present - defts wait reading of the superseding indictment and enter pleas of not guilty - bail: transferred from indictment to superseding indictment as to each deft - Govts motion for severance granted - case adjd to May 24, 1976 for trial.
24-76	Before NEAHER, J - case called - adjd to July 1, 1976 for trial
13/76	Notice of Readiness for trial filed. (MASSINO & WEAN)
7-76	Before Neaheer, J - case called - defts & attys present - adjd to Oct. 12, 1976 for trial
2/76	Before NEAHER, J.- Case called. Defts present. Counsel for Massino present. Counsel for Wean not present. Case adjd to 11/8/76 at 10:00 a.m. for trial. 10/12/76 I
8-76	Before Neaheer, J.- Case Called. Defts Present. H. Weisswasser (Wean Counsel) present. Mastropieri (Massino Counsel) not present. Case adjd. to 11-22-76 at 10:00 A.M. For Trial as to deft. Wean only. MASSINO 11-8-76 T
2-76	Before Neaheer, J.- Case Called. Deft. & Counsel present. On motion of AUSA Marks Count two of 75 CR 471(S) is severed from counts one and three Trial ordered and begun. Jurors were selected and sworn. Govt. opens. Deft. opens. Trial continued to 11-23-76 at 10:00 A.M. (DAVID WEAN)
1-23-76	Before NEAHER, J - case called - deft WEAN & counsel Robert Weisswasser present - trial resumed - defts motion for dismissal of the indictment denied - trial contd to 11-24-76
1/24/76	Before NEAHER, J. - Case called. Deft & Counsel present. Trial resumed. Da moves for dismissal of indictment - denied. Deft rest, govt rests. Trial continued to 11/29/76 at 10:00 a.m. (WEAN).
1-29-76	3 transcripts filed (one dated Nov. 22, one dated Nov 23 and one dated Nov. 24, 1976 respectively)
11-29-76	By Neaheer, J - Order of sustenance filed
-29-	Before Neaheer, J - case called - deft WEAN & counsel Robert Weisswasser present - trial resumed - alt. Jurors excused Deputy Marshals sworn - Order of sustenance signed (Lunch) Jury begins deliberation - Jury

DATE	PROCEEDINGS
	Case adjd without date for sentence - trial concluded.
11-30-76	Stenographer's Transcript dated November 22, 1976 filed. (RAYMOND W)
12-22-76	Stenographer's Transcript dated November 24, 1976 filed. (RAYMOND W)
2-8-77	Before NEAHER, J-4 case called - deft MASSIMO & counsel Eugene Mastropieri present - suppression hearing ordered and begun - Jury selection begun - case adjd to 2-9-77
2-9-77	Before NEAHER, J - case called - deft & atty present - (MASSIMO) counsel Eugene Mastropieri - suppression hearing resumed - suppression hearing contd to 2-10-77
2-10-77	Two transcripts filed (one dated 2-8 and one dated 2-9-77 respectively) MASSINO
2-10-77	Before NEAHER, J - case called - deft & counsel E. Mastropieri present - suppression hearing resumed - hearing concluded - defts motion to suppress Granted - hearing concluded - adjd to 3-14-77 for status report - Bail contd . 2-10-77 D 3-14-77
2/11/77	Sealed Transcript from Emanuel Karr filed and placed in vault. (M)
2-11-77	Stenographers transcript filed dated 2-10-77
2-11-77	Before Neaheer, J - case called - deft Wean & counsel Robert Weiswasser present - adjd to 2-25-77 for sentence at 4:30 PM.
2-11-77	Memorandum of Law filed (Wean)
3/7/77	Govts notice of appeal filed. (JOSEPH MASSINO).
3/7/77	Docket entries and duplicate of Notice of Appeal mailed to the Co. (JOSEPH MAS)
3/10/77	Govts memorandum of law filed. (WEAN)
3/10/77	Before NEAHER, J. = Case called. Deft & Counsel present. Defts motion for a new trial argued and denied. Deft after being found guilty by jury verdict on count 2 is sentenced: 3 years imprisonment to run concurrent with the 16 months parole time which the deft owes. Deft informed of fight to appeal. Form A filed. Deft to file notice of appeal. The conspiracy count (count 1 remains open until govt moves to dismiss. (WEAN)
3/10/77	Judgment & Commitment filed. Certified copies to Marshals. (WEAN)
3.16.77	Notice of Ordering of Partial Transcript filed and forwarded to Chambers (JOSEPH MASSINO)
3-21-77	Notice of appeal filed as to deft MASSIMO and duplicate of notice mailed to the court of appeals,

DATE _____

PROCEEDINGS

-21-77	By NEAHER, J- Order filed withdrawal of appeal dated March 7, 1977, from the Order of the U.S. District Court for the Eastern Dist. of NY entered on Feb.10, 1977 , which ordered the suppression of the defts statements on March 11, 1975 (JOSEPH MASSINO)
1.12.77	Order filed received from the Court of Appeals that the appeal be docketed and the record filed on or before April 6, 1977. (RAYMOND D. WEAN)

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----- X

UNITED STATES OF AMERICA

SUPERSEDING INDICTMENT

- against -

Cr. No. 75 CR 471(S)
(T. 18, U.S.C., §539, §2, 3
and §371)

JOSEPH MASSINO and
RAYMOND WEAN,

Defendants.

----- X

THE GRAND JURY CHARGES:

COUNT ONE

On or about the 11th day of March 1975, within the Eastern District of New York and elsewhere, the defendants JOSEPH MASSINO and RAYMOND WEAN did knowingly, wilfully and unlawfully combine, conspire, confederate and agree together and with others unknown to the Grand Jury to commit an offense against the United States in violation of Section 659 of Title 18, United States Code, by receiving and having in their possession approximately two hundred twenty five cartons of miscellaneous goods having a value in excess of One Hundred Dollars (\$100), which goods had been stolen from Hemingway Transport, Inc., while moving as a part of and constituting an interstate shipment of freight from Georgia, Maine, Maryland, Massachusetts, North Carolina, Rhode Island, South Carolina and Virginia to New York, the defendants JOSEPH MASSINO and RAYMOND WEAN knowing the same to have been stolen.

In furtherance of the aforesaid conspiracy and

to effect the objects thereof, the defendants did permit

11/22/76
on notice of Govt
seen at 43 sealed
Govt represents
it will dismiss
it at
appears time
not prosecute
Wean

O V E R T A C T S

1. On March 11, 1975, the defendant RAYMOND WEAN drove a tractor trailer containing the above-described stolen goods to the vicinity of Rust Street and Maspeth Avenue, Maspeth, New York.

2. On March 11, 1975, the defendant JOSEPH MASSINO drove a blue 1974 two-door Cadillac to the vicinity of Rust Street and Maspeth Avenue, Maspeth, New York. (Title 18, United States Code, Section 371).

C O U N T T W O

On or about the 11th day of March 1975, within the Eastern District of New York, the defendants JOSEPH MASSINO and RAYMOND WEAN did wilfully and unlawfully receive and have in their possession approximately two hundred twenty five cartons of miscellaneous goods having a value in excess of One Hundred Dollars (\$100), which goods had been stolen from Hemingway Transport, Inc., while moving as a part of and constituting an interstate shipment of freight from Georgia, Maine, Maryland, Massachusetts, North Carolina, Rhode Island, South Carolina and Virginia to New York, the defendants JOSEPH MASSINO and RAYMOND WEAN knowing the same to have been stolen. (Title 18, United States Code, Section 652 and Section 2).

C O U N T T H R E E

On or about the 11th day of March 1975, within the Eastern District of New York, the defendant JOSEPH MASSINO knowing that Raymond Wean unlawfully had in his possession goods stolen from an interstate shipment in violation of Title 18, United States Code, Section 652, did knowingly and wilfully

7a
receive, comfort and assist the said Raymond Wean in order
to hinder and prevent his apprehension, trial and punishment.
(Title 18, United States Code, Section 3).

A TRUE BILL

FOREMAN

DAVID C. TRAGER
UNITED STATES ATTORNEY
EASTERN DISTRICT OF NEW YORK

No. _____

UNITED STATES DISTRICT COURT

EASTERN District of NEW YORK

Division

THE UNITED STATES OF AMERICA

JOSEPH MASSIMO and
RAYMOND WHEAT,

Defendants.

INDICTMENT

(T. 18, U.S.C., 8059; 52, 92
and 5371)

A true bill,

Foreman.

Filed in open court this _____ day
of _____, A. D. 19____

Clerk.

Ball, § _____

DOCA 325-3071

GPO 902-432

FEDERAL BUREAU OF INVESTIGATION

1

Date of transcription 3/17/75

FRANK KOERNER, Pinter Brothers Freightways, Deer Park, New York, was advised of the official identity of the interviewing agent and the fact he was being interviewed concerning a possible violation of the Federal Theft From Interstate Shipment statute. KOERNER furnished the following information:

At approximately 9:30 AM, on March 11, 1975, KOERNER, while driving a Pinter Brothers tractor trailer, received a radio communication advising that a Hemmingway Transportation Company tractor trailer had been stolen, trailer number 1155, and tractor number 897. KOERNER stated that he noted this theft and while proceeding to a delivery in Maspeth, noticed a Hemmingway Transportation tractor trailer parked at the diner on Rust Street and Maspeth Avenue. KOERNER stated that he thought this peculiar because he knows Hemmingway Transportation Company normally only makes Manhattan deliveries. KOERNER stated that he noted the trailer number 1155 as being identical to the one reported stolen approximately 20 minutes earlier.

KOERNER stated that he immediately contacted his dispatcher at Pinter Brothers and was advised to keep the tractor trailer under observation. KOERNER stated that he parked his unit approximately 300 feet from the stolen unit on Rust Street in the same direction as the stolen unit. Approximately 15 minutes later, KOERNER noted an individual get into the cab of the Hemmingway tractor and proceed past KOERNER's truck making a U-turn behind KOERNER's unit, and proceeding toward Grand Avenue. KOERNER stated that the Hemmingway unit made a right turn on Grand Avenue and pulled to a curb at 56th Street. At this point, KOERNER discontinued his surveillance of the Hemmingway tractor trailer unit and proceeded to his next stop at the Santini Brothers Trucking Company.

KOERNER stated that he did not get a good look at the driver of the tractor trailer, nor did he see any other vehicles around the Hemmingway unit.

KOERNER was displayed photographs of the following individuals:

Investigation on 3/12/75 at New York, New York File # NY 15

by SA SCOTT E. MURPHY/abm 23 Date dictated 3/14/75

NY 15-
2

BALVATORE LA MANTIA
 STANLEY DIAMOND
 JOHN MICHAEL
 RALPH PISANO
 RAYMOND WEAR
 MICHAEL GUIDICE
 JOHN COLLINS
 WALTER PULLESE
 FRANK FRIGENTI
 JOHN MC MENEMON

KOERNER was unable to identify any of these individuals as being the driver of the Hemmingsway Transportation Company truck.

The following description of FRANK KOERNER was obtained through interview and observation:

Name	FRANK KOERNER
Address	115 Kramer Drive, Lindenhurst, Long Island, New York
Telephone	TU8-9059
Date of Birth	March 14, 1920
Place of Birth	New York, New York
Social Security	
Account Number	075-07-9162
Marital Status	Married
Wife	DOROTHY
Employed	Pinter Brothers Freightways, Deer Park, Long Island, New York
Arrests	None

24*

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3

1 THE COURT: I regret the delay.

2 MR. WEISSWASSER: Your Honor, there is one item
3 I would like to clear up before the jury comes in.

4 Your Honor will recall the Government called
5 Agent Morell yesterday, admittedly for a limited
6 purpose.

7 Prior thereto, the Government in 3500 material
8 had given us several pages of Mr. Morell's testimony.

9 Mr. Marks advises me he gave me that in error,
10 but we had it in our file. In reading through
11 Mr. Morell's testimony I noticed that the testimony
12 which I was given was partial, in fact, it starts out
13 on the page, if your Honor has the 3500 material, it
14 is 3500-2, on page 25, where his testimony says,

15 "Both the agents having been recalled previously sworn
16 resumed as follows."

17 Obviously there was testimony prior to that.

18 I had a conversation with Mr. Marks this morning
19 where I asked for the balance of the testimony.
20 Mr. Marks said it did not relate to what he said on
21 the stand.

22 The Government is not in a position to pre-judge
23 what is relevant and what is not. Once a witness is
24 called we are entitled to have his entire testimony if
25 it relates to this case. It is up to us to determine

1 testimony before it will be turned over to the
2 defendant.

3 THE COURT: Yes, but I think there is a very
4 narrow construction of subject matter. It doesn't
5 say to the testimony, it says the subject matter.

6 In my opinion, the subject matter is his
7 participation in the subject of this case. So I think
8 Counsel is correct in that view of it. I would direct
9 the Government to make available whatever the material
10 is if it pertains to this case.

11 MR. MARKS: In that event, in light of your
12 Honor's ruling, Agent Morell will be available for
13 further cross-examination. I am now turning over --
14 May I have this marked? It is a 3500 exhibit.

15 THE CLERK: 3500-5, multi-page document, marked
16 Government's exhibit 3500-5.

17 MR. WEISSWASSER: Mr. Marks, so that we may keep
18 the record straight, I am going to remove from 3500-3
19 which you have already given me, two pages, 25 through
20 27, Mr. Morell's continuing testimony, and I ask that
21 be attached and be part of 3500-5 and delete 3500-3.

22 MR. MARKS: I don't follow that at all. I
23 suggest we continue numbering these in order. 3500-5
24 is a copy of the entire case report. 3500-6, which I
25 am turning over now, are the grand jury minutes.

2 1 My point is, as counsel points out, he wasn't
3 of course examined on on the reasons why he wasn't
4 able to make an identification. I know he was shown
5 photographs which may or may not indicate -- they may
6 have been face photographs -- with no indication of
7 the size of a person, whether he was large or small or
8 so forth. I don't know what to say. Let me ask you
9 this, what is it you want to do here?

10 MR. WEISSWASSER: Judge, before we continue with
11 this trial -- I am not moving for a mistrial -- but I
12 would ask that this Court declare a recess. I would
13 like the address of the witness. I would like to send
14 an investigator over. I would like a continuance in
15 this matter. I was going to say until Thursday but
16 unfortunately Thursday is Thanksgiving. I am asking
17 until Friday.

18 THE COURT: Well --

19 MR. WEISSWASSER: Judge, I can't swear that this
20 witness is going to be called by the defendant --

21 THE COURT: I am not requiring you to swear to
22 that.

23 MR. MARKS: By the way, he is in no position to
24 be called in view of the fact he has just come out of
25 the hospital after having a lung removed.

He is not available to us except by way of

15

3 1 deposition and I am not sure he is in any condition --

2 MR. WEISSWASSER: That is the whole horror of
3 not receiving Brady material promptly. Witnesses
4 disappear and die. Here a man had a lung removed.

5 A month ago the case was pending -- what was the
6 date of the interview of this witness, your Honor?

7 THE COURT: According to this, 3/17/75.

8 MR. WEISSWASSER: This case is now pending a
9 year and nine months and we find out -- and year and
10 six months approximately -- and we find this out a
11 year and six months after he was driving a truck and
12 not having a lung removed.

13 MR. MARKS: But of course the significant thing,
14 I believe, is the fact that this man said "I didn't get
15 a good look at the defendant."

16 THE COURT: I understand, Mr. Marks, but again,
17 he was shown a photograph of the man that the
18 Government said did it and he was unable to identify
19 him.

20 On what is reported here, particularly since we
21 have a case where there is no question a truck was
22 hijacked, the whole question is one of identification.

23 As I see it, that is what the defense is all
24 about.

25 MR. MARKS: That is the way it is shaping up now.

16

THE COURT: It becomes clearer now.

MR. WEISSWASSER: He saw the movements of the vehicle. He obviously, or hopefully, may have seen the movements of the agent. He may corroborate Mr. Colgan's testimony or contradict Mr. Colgan's testimony, I don't know.

THE COURT: I must say I am in somewhat of a quandary at the moment.

MR. WEISSWASSER: I think in all fairness --

THE COURT: This -- it is your information that it would be futile to attempt to interview him at this juncture?

MR. MARKS: That is correct.

THE COURT: He is just out of the hospital you say?

MR. MARKS: Agent Morrell, do you know when he got out of the hospital?

AGENT MORRELL: The last time I talked to him, which was prior to this -- September, we were scheduled to come into Court in September. He was out of the hospital three weeks ago. I would say a month and a half or two months. He may be available to come in.

MR. MARKS: Why don't you go up and call Mr. Koerner and see if he is in any condition to come over here. If so, the FBI can make arrangements to have

1 STEPHEN MORRILL, having been duly sworn,
2 was examined and testified as follows:

3 DIRECT EXAMINATION

4 BY MR. MARKS:

5 Q You are a special agent with the FBI?

6 A I am.

7 Q And are you associated with any particular
8 squad?

9 A Truck Hijack Squad of the New York office.

10 Q I show you Government's Exhibit 6 in evidence,
11 do you know who took that photograph?

12 A I did, sir.

13 MR. MARKS: I have no further questions.

14 MR. WEISSWASSER: I have no questions.

15 MR. MARKS: Government calls special agent
16 Patrick Colgan.

PATRICK F. COLGAN, J. R., having been
duly sworn, was examined and testified as follows:

THE CLERK: Diagram marked Government's Exhibit
7 for identification.

MR. MARKS: Counsel and I have stipulated that
this can be received in evidence.

THE COURT: All right, mark it in evidence.

THE CLERK: So marked.

26

Colgan-direct

Q And what if anything did you observe, sir?

A I observed a Hemmingway tractor trailer parked on Rust Street just north of Masbath Avenue.

Q I show you what has been marked as Government's Exhibit 1 in evidence and I ask if you recognize that?

A Yes, I do.

Q What is that, sir?

A This is a photograph of the Hemmingway tractor trailer which I observed parked on Rust Street.

Q And where specifically referring now to the map, Government's Exhibit 7, were you when you observed the trailer and where was the trailer?

A I had come to the intersection at this point, coming down Masbath Avenue I looked to my right and I observed the Hemmingway tractor trailer parked on Rust Street. I would call that the northeast corner of Masbath and Rust.

Q How far were you from the tractor trailer?

A I approximate fifty feet, and then I proceeded to go by the tractor trailer and determine the license plate number of the tractor and further observed that there was no one in the tractor at that time.

Q Then what did you do?

A I proceeded pass the tractor trailer in order to get the license plate number on the tractor.

27

Colgan-direct

Q Did you get it by the way?

A Yes.

Q What is the license plate number?

A A80308.

Q What did you do then?

A I made a left turn on 56th Terrace, pass the tractor trailer and parked on Rust Street south of Masbeth Avenue. In other words, I was able to observe this tractor trailer facing in the opposite direction through my side view mirror.

Q So that you were facing south; is that correct?

A Yes. I was parked here (indicating) facing south.

Q And what direction was the tractor trailer facing in?

A The tractor trailer was parked here (indicating) facing north.

Q Was it parked on the same side of the street as you were or the opposite side?

A It would have been the opposite side.

Q About how far were you from the tractor trailer at that point?

A Approximately 150 feet.

Q And then what did you observe, sir?

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A Approximately fifteen minutes to twenty minutes later, perhaps between 10 and 10:15, I observed defendant Raymond Wean.

Q Will you stand up, please?

Is this the man you observed?

A Yes, it is.

Q Any question in your mind about that?

A None whatsoever; proceeding on foot from this vicinity.

Q Indicating the corner of Masbeth and Rust.

A That's correct.

MR. WEISSWASSER: If your honor please, indicating somewhat east of the corner of Masbeth and Rust.

Q Just show us so that we are all clear exactly where it is, so the record is absolutely clear, hold the pointer at the place where you first observed the defendant.

A On the corner of Masbeth and Rust.

Q And that's the southeast corner of Masbeth and Rust?

A That's correct.

Q Now, there is a triangle at the intersection of Masbeth and Rust. What is at that triangle?

A This entire triangle is the Clinton Biner. It is a parking lot as well it's a parking lot.

65

(Out of hearing of the jury)

1
2 MR. MARKS: Mr. Weisswasser just called
3 Mr. Coerner and spoke to him. Apparently he's too
4 sick to come into Brooklyn. My information, I get it
5 from Agent Morrill, is that since Mr. Coerner got out
6 of the hospital, he has not travelled more than five
7 minutes away from his house.

8 Mr. Weisswasser has suggested one possibility
9 and that is stipulating to his testimony. I don't
10 think that is feasible. I think what would be feasible
11 is taking his deposition on the telephone. Perhaps
12 we can do that in chambers.-- He can be sworn and have
13 a court reporter present and have a speaker phone.

14 MR. WEISSWASSER: I have no objection to that.
15 I asked him if we could come to his home this morning
16 to depose him and he advised me that he's taking pain
17 killers and tranquilizers and everything else and he
18 was uncomfortable talking on the telephone and by the
19 time we get there this morning, he doesn't know whether
20 he will be able to testify.

21 I suggested then that we try to make a tape
22 recording of the conversation with him now with both
23 myself and Mr. Marks, each of us on one extension and
24 record the conversation and then work out a stipula-
25 tion as to what his testimony would be. I have no

1 67 I would move to dismiss the indictment.

3 2 MR. MARKS: I am willing to accommodate
3 Mr. Weisswasser.

4 MR. WEISSWASSER: I realize that, but it is my
5 client whom I'm concerned with.

6 THE COURT: I don't believe that a deposition
7 by telephone under no circumstances seems feasible
8 to me. I really think a deposition in the sense of
9 having a reporter present who could administer an
10 oath and which the parties would agree, so that you
11 could have an opportunity to see the witness and also
12 I believe that the witness may want to have a nurse
13 or someone available because of the natural strain
14 on someone like that, in his condition, I realize
15 your questions would very likely be limited because
16 of his condition.

17 MR. WEISSWASSER: Absolutely. I don't intend
18 to strain the man physically. I am willing, even
19 though I thought this would be a short case, if we can
20 go on with the Government's case, you can do that
21 tomorrow, I will just have the jury come in on Friday
22 which is what I would expect we would be doing.

23 MR. MARKS: Perhaps we can go out to Lindenhurst
24 late this afternoon.

25 THE COURT: It is up to you, if you think this

(First witness for the defense)

79

D O R O T H Y W E A N, called as a witness having been
first duly sworn by the Clerk of the Court, testified
as follows:

DIRECT EXAMINATION

BY MR. WEISSWASSER:

Q Mrs. Wean, what is your relationship to the
defendant, Raymond Wean?

A I am his wife.

Q For how many years were you married?

A Eight years.

Q When were you divorced?

A In 1968.

Q Have you any children from that marriage?

A Yes.

Q How many?

A Two.

Q What are their ages presently?

A My son is ten and my daughter is 13.

Q Calling your attention to the morning of
March 11, 1975, do you remember that date?

A Yes, I do.

Q Did you have occasion to speak to your ex-husband,
the defendant Raymond Wean on that date?

A Yes.

30

D. Wean-direct

Q Tell us the circumstances of that conversation.

A I had called him about a little after 9 o'clock in the morning. I was having trouble with my son in school and I had called him to ask his assistance to help me with my boy. He was boisterous in school.

Q Where did you call him to come to help you?

A At his home.

Q At your son's home?

A No, my ex-husband's home.

Q Where did you ask Ray to come?

A To my home in Maspeth.

Q What address?

A 6014 55th Drive.

Q In Maspeth?

A Yes.

Q And what did your husband tell you he was going to do?

A That he would be over shortly.

Q And did your husband arrive at your home that morning?

A No, he did not.

Q Did have anything further to do with your ex-husband that day at all?

A No.

D. Wean-redirect

A The only way I can fix it, it happens to be my anniversary.

MR. WEISSWASSER: I have no other questions.

RECROSS-EXAMINATION

BY MR. MARKS:

Q Mrs. Wean, where were you married?

A Where was I married?

Q Yes.

A Christ Lutheran Church.

Q Where is that?

A Astoria.

Q When was that?

A March 11, 1962.

Q This wasn't the first time your husband was arrested, was it --

MR. WEISSWASSER: I object if your Honor please and I ask for a sidebar.

THE COURT: Yes.

(sidebar)

MR. WEISSWASSER: If your Honor please at this time the defendant most respectfully moves for a mistrial.

THE COURT: It didn't open open the door, no. There is a problem here. I'm wondering whether it's

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D. Kean- recross

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possible to erase this from the jury's mind.

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First of all, an arrest is meaningless, as you understand.

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MR. MARKS: I understand.

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7

THE COURT: Meaningless in the sense it wouldn't be admissible as evidence of anything concerning his record or anything of that sort.

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11

MR. MARKS: All I'm trying to do is establish the fact that he was arrested, many many times and accordingly there's nothing very special of March 11.

12

13

14

THE COURT: That would be totally impermissible and would certainly seal the fate of this trial if you persisted in that.

15

16

17

I don't know what to say to you. It's extremely prejudicial to this defendant, in the real sense I'm talking about. It's of no advantage here at all.

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19

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MR. MARKS: It is to the extent that Mr. Weisswasser had her testify that she remembered these events because she remembered them by virtue --

21

22

23

THE COURT: Anniversary date.

24

MR. MARKS: By reason of the fact that her husband was arrested on that date.

25

THE COURT: That's a coincidence of event, arrested on the date of his anniversary.

D. Wear recross

MR. WEISSWASSER: And the tenth and the twelfth those are the only two days I included.

THE COURT: It's extremely troubling.

MR. WEISSWASSER: I'm very loath to make this motion but I must press it. I hate to waste the time and effort. No one wants to go through with the trial faster than I have to.

THE COURT: I'm going to deny the motion for a mistrial, but I caution you, do not bring it up again.

I'm going to instruct the jury to disregard that.

MR. WEISSWASSER: Might my exception be noted.

THE COURT: Yes.

(open court)

THE COURT: Members of the jury, I'm going to instruct you to erase from your minds the last question by Government counsel. People are arrested for many things. Some of them quite inconsequentially and many times, with no foundation, as we all know.

It is not something that you should allow to remain in your minds in connection with your consideration on the evidence in this case. I'm trying to impress on you as firmly as I can.

D. Wean-recross

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2 MR. WEISSWASSER: I ask your Honor make one
3 further statement to the jury. I suppose I should
4 make the request sidebar.

5 (sidebar)

6 MR. WEISSWASSER: That is that the mere fact
7 the question was asked is not evidence that he was
8 arrested.

9 THE COURT: Yes.

10 (open court)

11 THE COURT: Also, it goes without saying that
12 the mere fact that the defendant was asked, is no
13 evidence that he was in fact arrested.

14 Bear that in mind.

15 RECROSS EXAMINATION

16 BY MR. MARKS:

17 Q Mrs. Wean, could you please relate the events
18 of March 11, 1976 to us?

19 A March 11, 1976?

20 Q Yes, this year?

21 A I'm sorry, but I can't remember.

22 Q How about March 11, 1974?

23 A No.

24 Q March 11, 1973, you remember that date?

25 A No.

(Out of hearing of the jury)

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MR. MARKS: I am happy to report that I think Mr. Weisswasser and I have entered into a stipulation with respect to Mr. Coerner's testimony.

MR. WEISSWASSER: We have it typewritten and we will ask the stenographer to read it at the proper time, so that I don't unduly place emphasis on any particular word. I think that would be appropriate.

I would like the record to be quite clear with the following matter, if your Honor please. We believe that this material is in the nature of Brady material and should have been turned over to the defendant some-time ago. The incident in question occurred on March 11, 1975, some 20 months prior to this date. The indictment, I believe, was in May or June of 1975. At that time, had the defense been made aware of Mr. Coerner and his statement made to the F.B.I. on March 12, 1975 --

THE COURT: The day after?

MR. WEISSWASSER: The day after, yes, and transcribed by the F.B.I.. It is on the 14th or 17th an official document which became part of their trial.

We first became aware of that when under the Court direction, Mr. Marks, turned those records over to us. I don't in any way nor do I wish the record to indicate

1 my belief, that Mr. Marks did so surreptitiously^{29a} or
2 in violation of Brady. I believe that he honestly and
3 sincerely felt that he could determine for the defendant
4 what was proper to be turned over and what was not. I
5 don't think he was deliberately hiding Brady material.

6 However, as your Honor and I agreed yesterday
7 when I made the application, that it is not for the
8 Government to decide what use the defendant can make and
9 what is properly exculpatory or not. If there is something
10 to be used by the defendant, it is the duty of the
11 Government to turn it over. I don't believe there is
12 any bad faith on the part of the Government in this
13 matter.

14 Had the defendant had the opportunity some 20
15 months ago or even 16 months ago, or even 12 months
16 ago to know of the existence of Mr. Coerner, we wouldn't
17 be faced with the fact that Mr. Coerner has had a lung
18 removed and is under medication, tranquilizers and the
19 such. And 20 months has elapsed and his memory has
20 faded since that time. The Government in the form of
21 Mr. Marks, has done everything it could to cure that
22 problem yesterday.

23 Mr. Marks offered to go out to Long Island to
24 depose him or do anything we possibly could. We worked
25 it out over the telephone and I don't think going out

1 to depose him would have served any more useful purpose
2 because obviously, the man gave us everything he
3 possibly could considering his condition and 20 months
4 having elapsed. I don't believe that 20 months later,
5 because of the circumstances as they exist today, that
6 this is curative of the defect. I'm taking it and
7 doing the best I can with it at this late date.

8 I urge on the Court, that that in no way cures
9 the problem here. There is no way to cure the problem
10 where -- when they let 20 months elapse and then an
11 unforeseeable event where the man had a lung removed
12 recently and is in no condition to be in a position to
13 concentrate on our problem as he is on his own problem.

14 The lung was removed due to cancer from what I
15 understand from Mr. Marks, who spoke to the F.B.I. and
16 talked to his wife and the man is not too long meant
17 for this world.

18 THE COURT: Is the original F.B.I. report going
19 to be made part of the record here, the 7500 --

20 MR. MARKS: We were just discussing that and I
21 would stipulate --

22 MR. WEISSWASSER: I would as well, but I point
23 out that the F.B.I. report, I have no objection to
24 that --

25 THE COURT: The reason I'm suggest it is this.

6 1 yesterday.

2 At this point I move for a dismissal of this
3 indictment on the ground that the People have failed
4 according to Brady to supply the defendant with an
5 element which is now impossible to completely satisfy.

6 THE COURT: Well, I think, in deciding such a
7 question, the Court has to weigh the prejudice, if
8 any, which has resulted from what the Court is
9 satisfied was not a willful non-disclosure on the part
10 of the Government.

11 I think the basic question is whether, when
12 it turns out to be as important as the Court concedes
13 it to be, and the way the argument has been presented
14 and having a live witness, and I am not all together
15 satisfied by the Government saying that this case
16 ~~could not~~ should have come to trial at an earlier date, it would
17 have still been possible to be in touch with Werner
18 and they would have known whether or not he was
19 going into a hospital and they could have made some
20 arrangement.

21 MR. WEISSWASSER: And possibly move this Court
22 for an earlier trial.

23 I attribute no bad motive on the part of
24 Mr. Marks. I point out that Mr. Marks was not the
25 assistant originally carrying this file. He recently

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1 this time the defendant offers a stipulation entered
2 into between the Government and the defendant in
3 regard to one, Frank Koerner. I would ask that
4 the reporter be directed to read the stipulation.

5 It consists of several pages and it is testi-
6 mony. I would not like it to be an inflection
7 of my voice to interfere with the proper reading.

8 THE COURT: Is it to be offered in evidence?

9 MR. WEISSWASSER: Yes.

10 MR. MARKS: So stipulated.

11 THE COURT: The reporter will read the stipu-
12 lation.

13 THE CLERK: Should I mark it in evidence?

14 THE COURT: Mark it in evidence.

15 (Defendant's Exhibit A is read to the jury)

16 "IT IS HEREBY STIPULATED, CONSENTED TO AND
17 AGREED by and between the parties that:

18 Frank Koerner, if called to testify, would
19 testify that on March 11, 1975, he was a driver for
20 Pinter Brothers Freightways, Deer Park, New York.
21 His truck was equipped with a 2-way radio by means
22 of which he could communicate with the dispatcher
23 of his firm.

24 At approximately 9:30 A.M. on March 11, 1975,
25 while driving his truck in Maspeth, Queens, he heard

1 a report on his 2-way radio that a Hemingway trans-
2 portation Company tractor trailer bearing trailer
3 #1155 and tractor #897 had been stolen.

4 Some minutes later, while proceeding west
5 on Maspeth Avenue, he observed the previously de-
6 scribed tractor and trailer parked on Rust Street
7 some two car lengths north of the N.E. corner of the
8 intersection of Maspeth and Rust. Koerner made a
9 full stop at the stop sign and then made a right
10 turn into Rust Street and drove past the tractor
11 trailer and saw no one in the cab. He then notified
12 his dispatcher and was told to keep the tractor
13 trailer under observation. Koerner then proceeded
14 passed the tractor trailer and made a U-turn and
15 parked approximately 300 feet north of the tractor
16 trailer on the west side of Rust Street facing the
17 front of the tractor trailer. That is, he was on
18 the opposite side of the street from the tractor
19 trailer.

20 Approximately 15 minutes later, he noted an
21 individual open the door and get in the tractor. He
22 first observed that individual as that individual
23 was opening the door where upon that individual
24 immediately entered the cab. He describes this
25 individual as being a white male of medium height and

222

20 1 build. Mr. Koerner at that time was 5'9" tall
2 and weighed 180 pounds and describes himself as
3 being a medium-sized man. He further states that
4 medium men weigh about 150-190 pounds and are about
5 5'7" to 5'10" tall. Mr. Koerner further states
6 that he didn't see the individual that closely and
7 didn't look at him that closely. He further
8 states that that individual definitely did not weigh
9 as much as 250 pounds.

10 He then saw the tractor trailer proceed north
11 on Rust, pass Koerner, make a U-turn, and then
12 proceed south on Rust to the intersection of Rust

13 Grand where it started to make a right turn on
14 to Grand. At that point, Koerner put his vehicle in
15 motion and proceeded to the intersection of Grand
16 and Rust. As he was making the turn he observed the
17 tractor trailer parked at the northerly curb of
18 Grand Avenue opposite a diner at 56th Street. He
19 proceeded past the tractor trailer. Mr. Koerner
20 states that he did not see anybody in the cab. He
21 states that as far as he can remember he did not
22 observe the individual he previously saw on the street
23 or in the vicinity and radioed his dispatcher that
24 he thought the man had gone into the diner and
25 that Koerner was leaving the area. As far as Koerner

1 remembers, he saw no one standing or walking in
2 the vicinity (25' to 50') of the truck. Mr. Koerner
3 believes that there probably were cars parked at
4 the curb in the vicinity of the truck. There was
5 nobody in the truck. He is sure that there were
6 no double-parked cars alongside the trailer.

7 He states that he would not be able to
8 recognize the individual today. On March 12, 1975,
9 he was shown a series of ten (10) photographs, one
10 of which was a photograph of Raymond Wean, and he
11 was unable to identify any of those individuals as
12 the person he saw entering and driving the tractor
13 trailer."

14 MR. WEISSWASSER: If Your Honor please,
15 at this time the defendant would offer Defendant's B,
16 a copy of an official FBI 302 form, filled out by
17 Agent Morell in regard to and interview taken by
18 Agent Morell of the same Mr. Koerner taken on
19 March 12, 1975.

20 MR. MARKS: I have no objection, your Honor.

21 THE CLERK: Defendant's Exhibit B received
22 in evidence.

23 (so marked)

24 MR. WEISSWASSER: If your Honor please, the
25 defendant rests.

AFTERNOON SESSION

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THE CLERK: Juror Note marked Court's Exhibit 1.

THE COURT: Have you had a chance to look at the material on the note and come to any conclusion?

MR. WEISSWASSER: We have.

MR. MARKS: We have the testimony and have given it to the reporter.

THE COURT: On the otherthing, was the Koerner statement --

MR. MARKS: Mr. Weisswasser and I agreed that that is the Defendant's Exhibits A and B.

MR. WEISSWASSER: A is a statement and B is a statement which he gave to the FBI. In regard to the testimony, inasmuch as that request is very specific, how he first heard about it, we have not gone past the fact that there was a radio communication and what time it was. We have not taken them to the time when he arrived at the location. If they want more, they can ask for it.

THE COURT: Their request seems quite explicit.

MR. WEISSWASSER: That is why we did it that way.

THE COURT: All right, bring in the jury.

(Jury present.)

THE COURT: Good-afternoon, members of the jury:

1 I have your note. After consultation with
2 counsel, we have agreed that there are certain pages
3 in the minutes which the reporter will read to you,
4 responding to your request as to how the FBI agent
5 first heard of the stolen truck.

6 The driver's statement, as you will recall,
7 really consists of two separate exhibits. We were
8 not altogether sure which one you wanted, but you are
9 entitled to see both. One was a statement given the
10 day after to an FBI agent and the other was a statement
11 given to counsel when they went out to his home to
12 see him, because he was too ill to come to Court.

13 You understand that is in evidence also.

14 As I say, you can have both of them and your
15 foreman can take them back to the jury room after you
16 hear the testimony here on the other point.

17 (Testimony read, November 22nd, page 24, line
18 25, to page 25, line 16. November 23rd, page 31, lines
19 13 through 21.)

20 THE COURT: We limited it to your request. You
21 may now resume your deliberations. The marshal has
22 those two exhibits.

23 (Recess taken.)

24 . . .

25 THE COURT: The jury announces that it has

1 25 Colgan-direct

2 around 9:20 or so in the morning, at that time were you
3 working?

4 A I was working in Queens, New York.

5 Q And were you on foot or were you in a car, in
6 a vehicle?

7 A I was in a bureau vehicle.

8 Q Did you have occasion to receive a radio
9 transmission?

10 A Yes, I did.

11 Q As a result of that radio transmission, did
12 you do anything?

13 A Yes, I did.

14 Q What did you do?

15 A Based on a radio transmission, I proceeded to
16 the vicinity of Masbeth and Rust Street in Masbeth, Queens.

17 Q Is the place you proceeded to depicted on
18 Government's Exhibit 7?

19 A Yes.

20 Q Could you point it out to the members of the
21 jury?

22 A Masbeth Avenue in Rust Street (indicating).

23 Q At about what time did you arrive at the
24 intersection of Masbeth and Rust?

25 A I would approximate 9:45 A.M.

26

Colgan-direct

Q And what if anything did you observe, sir?

A I observed a Hemmingway tractor trailer parked on Rust Street just north of Masbeth Avenue.

Q I show you what has been marked as Government's Exhibit 1 in evidence and I ask if you recognize that?

A Yes, I do.

Q What is that, sir?

A This is a photograph of the Hemmingway tractor trailer which I observed parked on Rust Street.

Q And where specifically referring now to the map, Government's Exhibit 7, were you when you observed the trailer and where was the trailer?

A I had come to the intersection at this point, coming down Masbeth Avenue I looked to my right and I observed the Hemmingway tractor trailer parked on Rust Street I would call that the northeast corner of Masbeth and Rust.

Q How far were you from the tractor trailer?

A I approximate fifty feet, and then I proceeded to go by the tractor trailer and determine the license plate number of the tractor and further observed that there was no one in the tractor at that time.

Q Then what did you do?

A I proceeded pass the tractor trailer in order to get the license plate number on the tractor.

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Colgan-direct

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Q Did you get it by the way?

3

A Yes.

4

Q What is the license plate number?

5

A A80808.

6

Q What did you do then?

7

A I made a left turn on 56th Terrace, pass the

8

tractor trailer and parked on Rust Street south of Masbeth

9

Avenue. In other words, I was able to observe this tractor

10

trailer facing in the opposite direction through my side view

11

mirror.

12

Q So that you were facing south; is that correct?

13

A Yes. I was parked here (indicating) facing

14

south.

15

Q And what direction was the tractor trailer

16

facing in?

17

A The tractor trailer was parked here (indicating)

18

facing north.

19

Q Was it parked on the same side of the street

20

as you were or the opposite side?

21

A It would have been the opposite side.

22

Q About how far were you from the tractor trailer

23

at that point?

24

A Approximately 150 feet.

25

Q And then what did you observe, sir?

40

Colgan-cross

A Yes.

Q It doesn't magnify things thirty times?

A No.

Q When you say you were 150 feet, could it have been 200 feet?

A It could have been.

Q When you say 150, 200 feet, are you measuring it from the rear of your vehicle to the rear of the tractor or from the front of your vehicle to the front of the tractor?

A I think the word approximate contains all the possibilities we are talking about.

Q How long is that tractor trailer?

A I believe that was a 35 footer.

Q So it could have been 200 feet from the rear of your vehicle to the rear of the trailer; it could have been another 35 feet to the front of the trailer?

MR. MARKS: Objection.

THE COURT: You may answer.

A My total distance from 150, 200 covers all distances -- Encompasses all distances.

Q All the possibilities?

A Yes.

Q You say you first saw a man coming around the corner from the vicinity of the Masbeth side of the diner;

29

Colgan-direct

Q Where was the defendant when you saw the defendant at the Clinton Diner?

A Far side of the diner, coming into my view on the far side of the diner or the Masbeth Avenue side of the diner.

Q Then what did you observe?

A I watched him walk to the tractor trailer and enter the tractor portion of the truck.

Q Now, at that time was he facing you or was he facing away from you?

A His back was to me at this point.

Q Did you observe where he went?

A Yes, he went right to the tractor.

Q And when he got to the tractor, what, if anything did he do?

A Shortly after he got inside, the tractor proceeded to move north on Rust Street.

Q Did you actually see him get inside?

A Yes, I did.

Q Were you looking in the mirror or were you looking at him?

A I was watching him in the mirror.

Q What did you observe after that?

A I observed the truck proceeding north on Rust

41

Colgan-cross

is that right?

A I first saw Mr. Wean in my side view mirror for the first time at that point.

Q Had you seen any other human beings from the time you first got to the area to the time that you saw Mr. Wean, as you say?

A I don't recall.

Q You don't recall.

Had you known Mr. Wean prior to this occasion?

A No, I did not.

Q Did you make note of anybody else when you first saw Mr. Wean, as you say, standing in that area before he did anything; you weren't particularly interested in him, were you?

A That's correct.

Q Did you make note of his facial characteristics when you first saw him?

A When I first saw him I did not see his face.

Q When for the first time did you see his face?

A The first good look at his face was when he came back by me when I was parked in the diner parking lot.

Q So what you saw then was a man, you are not sure it was Mr. Wean, except you are assuming the fellow that in the truck is the fellow that got out of the truck?

31

Colgan-direct

A The truck passed at the stop sign of _____ and Rust Street.

Q And at that point, how far were you from the tractor trailer?

A I would approximate 50 to 75 feet. At that point the truck came through the intersection straight down Rust Street and passed me as I was sitting in the diner lot.

Q How close were you to the driver?

A At this point the front of my car is facing Rust Street and I had a clear view of the driver of the tractor, perhaps 20 to 30 feet.

Q Did you see who the driver was?

A Yes.

Q Who was the driver?

A The defendant Raymond Wean.

Q For what period of time did you have the driver in your line of sight?

A Perhaps two to three seconds and long enough to obtain a good description of him.

Q Then what happened, sir?

A I paused a few seconds to let the slow moving tractor trailer get some distance ahead of me.

Q Could you estimate the speed it was moving at?

A No more than fifteen miles an hour.

1 32

Colgan-direct

2 Q Please continue.

3 A And just allowing it a few seconds to get passed
4 me before I wanted to fall in behind it, I observed a blue
5 '74 two-door Cadillac come into my view and proceed directly
6 behind the tractor trailer. At that point I fell in line
7 between -- Behind the Cadillac. We proceeded -- Three
8 vehicles proceeded down Rust Street to Grand where he came
9 to a traffic light that was red.

10 Q What was the order of direction when you got
11 to Grand?

12 A The first vehicle at the red light was the
13 tractor trailer; the second vehicle was the blue Cadillac
14 I mentioned; and I was then the third vehicle. This street
15 at this point is simply a two-lane road, one-way in each
16 direction.

17 Q Referring to Rust Street?

18 A Yes, I am. At the traffic light the blue
19 Cadillac pulled up along side the tractor portion of the
20 Hemmingway truck into the oncoming lane, and I proceeded to
21 come up right behind the trailer portion of the truck and
22 observed what appeared to be two occupants in the Cadillac in
23 conversation with the driver of the tractor, Mr. Wean. The
24 light then changed green and the tractor trailer made a right-
25 hand turn or in a westerly direction on Grand Avenue and

33

Colgan-direct

proceeded down to the vicinity of 55th Street here (indicating) where it parked at the curb.

Q Then what did you do?

A I'm just a short distance behind on Grand and was able to observe Mr. Wean exit the tractor portion. He proceeded to take a few steps towards Rust Street, but did not get pass the rear of the trailer at which point he turned around and walked in front of the tractor onto the sidewalk here (indicating) at Grand Avenue and approximately 54th Street.

Q That's on the north side of Grand Avenue?

A North side of Grand; right. At which time I identified myself and arrested him.

Q Did you identify yourself?

A I identified myself by name and advised him that I was a special agent of the FBI and he was under arrest for possession of a stolen motor vehicle.

Q Did he state anything to you?

A Yes.

Q What did he say?

A He said he was not in any truck and was just simply walking down the street.

MR. MARKS: I have no further questions.

MR. WEISSWASSER: Let

Colgan - cross

1 26
2 "Question: At the time you arrested Mr. Wean
3 what if anything did you say to him and what did he say
4 to you?"

5 "Answer: At the time I arrested Wean, he was
6 standing --- walking on the sidewalk. I got out of my
7 vehicle and immediately identified myself as to my
8 name and my position and told him that he was under
9 arrest for possession of a stolen tractor-trailer.
10 His first statement to me was immediately that he was
11 not in the tractor-trailer."

12 And then it continues further.

13 Were you asked that question and did you make
14 that answer?

15 A I guess I did.

16 Q Was it true at the time you made it?

17 A To the best of my knowledge, it was.

18 Q To the best of your knowledge? You mean you
19 testified under oath to things that were not to the best of
20 your knowledge?

21 A It is accurate.

22 Q You're not trying to tell us where you were not
23 too sure you just put in words for the sake of putting in
24 verbiage to make your reports complete?

25 A That is not true.

Radan-direct

145

Q Do you know the defendant Raymond Wean?

A Yes, sir.

Q How long do you know him, sir?

A Approximately ten years.

Q Calling your attention to the morning of March 11th, 1975, do you remember that date?

A Yes, sir.

Q Can you tell us what you did that morning?

A Well, I went over to Mr. Wean's house in the morning and we had breakfast.

Q Approximately what time would you arrive at Mr. Wean's house?

A Approximately 8:30.

Q Please proceed.

A We had breakfast and shortly after 9:00 o'clock he get a telephone call from his ex-wife asking him to come down there. So, he asked me to drive him down there because his car was, at that time, not functioning. So, I went with him and we drove down towards his ex-wife's house.

Q Did you arrive at his ex-wife's house?

A No -- that is, I never did. I had decided to visit somebody I knew in the neighborhood and I bypassed the exit that we were going to get off at.

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Rudan-direct

146

Q Well, on what road were you that you say --

A The Long Island Expressway.

Q What exit would you have taken in order to get to Mr. Wean's ex-wife's house?

A That would be Maurice Avenue.

Q Did you get off at Maurice Avenue?

A No, sir.

Q What exit did you get off?

A Eventually 48th Street.

Q Between Maurice Avenue and 48th Street, was there a conversation between yourself and Mr. Wean?

A Yes.

Q Will you tell us the nature of that conversation?

MR. MARKS: Objection.

THE COURT: Well, what about hearsay aspects?

MR. WEISSWASSER: If your Honor please, we're not offering it for the truth, but the fact that these words were uttered.

MR. MARKS: I would like an offer of proof.

THE COURT: Come to side bar.

(Side bar)

THE COURT: What is the proposal?

MR. WEISSWASSER: We'll prove through this

Rudan-direct

147

witness an argument ensued between he and Mr. Wean as to the fact Mr. Wean was in a hurry to get to his wife's house; that he wanted to stop at a girlfriend's place on the way and that when he got off -- missed the Maurice Avenue exit where he would have taken Mr. Wean, he came down 48th Street. He went the other way to see his girlfriend.

Mr. Wean got mad, he left Mr. Wean off approximately a block away from where this incident occurred. He went his way and --

MR. MARKS: Keep your voice down.

MR. WEISSWASSER: Mr. Wean walked down the street.

We are going to prove not the fact of the truth of these utterances, but merely an argument ensued. He can testify to what the argument was. It's not hearsay; it's what he said. What Mr. Wean said is only utterances and he subsequently made arrangements.

He knows what time he left, made arrangements maybe they would see each other at Mr. Wean's wife's house at a particular time.

MR. MARKS: I strongly renew my objection.

THE COURT: Let me put it this way. I think

Rudan-direct

THE COURT: You can do that.

MR. WEISSWASSER: That's what I said.

THE COURT: Not the details.

MR. MARKS: As I understand, it's simply what Your Honor has stated, had an argument; as a result of that argument he went one way and Wean the other.

MR. WEISSWASSER: He can say what he said.

THE COURT: To Wean. That's not hearsay. He can say because you can cross-examine him on that.

(open court)

Q Let me rephrase that last question, if I may, Mr. Rudan.

Did you have a conversation with Mr. Wean between Maurice Avenue and 43th Street?

A Yes, sir.

Q What did you say to Mr. Wean?

A I told him that I was going down, in that area, to visit a girlfriend of mine.

Q Would you tell us what Mr. Wean said, in words, can you tell me, did he make a response to your statements?

A Yes, sir.

Q Would you be able to characterize as to whether he was happy --

MR. MARKS: Objection.

Rudan-direct

1
2 THE COURT: Yes, I don't think the characteri-
3 zation is permissible.

4 You can ask this witness what he said.

5 MR. WEISSWASSER: I thought we went further
6 in that regard, Judge.

7 THE COURT: He can say what he said under those
8 circumstances and what happened as a result of it.

9 MR. WEISSWASSER: All right.

10 Q Did Mr. Wean agree to go with you to the
11 girlfriend's house?

12 MR. MARKS: Objection.

13 MR. WEISSWASSER: That's an utterance. It's
14 not for the truth of the statement.

15 MR. Marks: well knows that.

16 MR. MARKS: Indirect hearsay.

17 MR. WEISSWASSER: Not hearsay. This witness
18 knows whether Mr. Wean agreed or did not agree.

19 THE COURT: I'll overrule the objection. You
20 may ask that. Did you hear the question?

21 THE WITNESS: Could you repeat it?

22 Q Did Mr. Wean agree to go with you to your
23 girlfriend's?

24 A No, sir.

25 Q You say you got off at the 48th Street exit?

Rudan-direct

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A Yes, sir.

Q How did you proceed from there?

A Well, I swung around, went down between Maspeth
Avenue.

Q Where did you go from there?

A Well, another brief argument ensued whereupon
Mr. Wean got out of the car.

Q Where did you leave Mr. Wean out of the car?

A Approximately -- 54th Street.

Q And where?

A Grand Avenue.

Q What did you do after you left Mr. Wean out
of the car?

A I made a U-turn and swung around back down.

Q Calling your attention to Government's 7 in
evidence, showing you Grand Avenue, where along Grand Avenue
did you let Mr. Wean out?

A Right down here (indicating) the lower left
hand corner.

Q Do you know --

A Not that far, down by 54th.

Q Before 55th?

A Just right on the corner.

Q Right on the corner of 54th Street?

Rudan-direct

1
2 A Right.

3 Q Do you know what time it was when you let
4 Mr. Wean out on the corner of Grand Avenue and 54th Street?

5 A Yes, sir.

6 Q What time was it?

7 A About 10:30.

8 Q How do you know it was 10:30 when you let him
9 out?

10 A During the discussion we had, he had told me
11 to pick him up about 12:00.

12 MR. MARKS: Objection.

13 MR. WEISSWASSER: Obviously that's not being
14 offered for the truth of the utterance, but the fact
15 that the utterance was made.

16 THE COURT: All right, I'll overrule the objection
17 on that limited basis.

18 MR. MARKS: Could we have a limiting instruction
19 on that, your Honor?

20 THE COURT: Yes. Remember, ladies and gentlemen
21 of the jury, there are some statements that are of a
22 hearsay character in that someone is saying what some-
23 body else said. Such a statement is not to be taken
24 by you as proving the truth of the statement, but
25 simply that that was an utterance made; do you

Rudan-direct

154

1 understand? Like, "my hat blew off", someone said.
2 Although the hat didn't blow off, but the question is,
3 "did he make such a statement", not whether it was true
4 or not, under certain circumstances and this is one
5 of them where you may consider whatever effect that
6 the utterance may have in the entire context of the
7 facts and not necessarily accepting it as true.
8

9 Q Mr. Rudan, you say you agreed to pick Mr. Wean
10 up when?

11 A At 12:00.

12 Q Where?

13 A Right in front of his wife's house.

14 Q Despite the fact that you were to pick him
15 up at 12:00, how did you know it was 10:30 when you let him
16 off?

17 A Well, to check the time to see how much time
18 I have.

19 Q What did you do after you left Mr. Wean?

20 Q I proceeded back into -- you know, that area,
21 to visit the girl I was going to see in the first place.

22 Q Did you see Mr. Wean at any time later that day?

23 A No, sir, I did not.

24 Q When was the next time you saw Mr. Wean?

25 A The following day.

MR. WEISSWASSER: I have no further questions.

Colgan-redirect

seems to suggest -- "Okay, you have me." But it doesn't say that.

MR. MARKS: It comes awfully close. It certainly supports the inference that the FBI has the goods on him.

MR. WEISSWASSER: This is coupled with the denial, his being on the truck.

MR. MARKS: But that follows of course -- that follows the Agent's statement, "What do you mean you weren't in the truck. I saw you get into the truck, I saw you get out." At that point he realized that he was under surveillance. He says, "Look, give me a break. I'll do anything for you. Give me a break."

THE COURT: Well, I'm troubled by the fact we went over this initially. If it were going to be used on the direct case counsel might well have had the benefit of the suppression hearing. He would have been given the opportunity to cross-examine this agent out of the presence of the jury to determine the circumstances under which that statement was made. I would have to say that I think you better hold that until a rebuttal case.

I feel it would be unduly prejudicial and I'm not satisfied in my own mind here with this agent.

Colgan-redirect

He's a nice looking man and all that. There is also the possibility of mistake here. I rather say, don't use it now. I won't rule out the possibility when it comes to a rebuttal case, then we'll have a whole picture of what the defense is all about. It may be usable at that time -- because I did hold that open.

MR. WEISSWASSER: Thank you, your Honor.

(Whereupon side bar conference was concluded.)

REDIRECT EXAMINATION

BY MR. MARKS (Continued):

Q Agent Colgan, you testified on cross-examination that you identified Joseph Messina in a Cadillac; is that correct?

A That's correct.

Q Did your eyes meet?

A Messina's eyes and my eyes -- yes, they did.

Q And after your eyes met, did you notice any expression on Messina's face?

A Yes; an expression that indicated to me that he knew exactly who I was.

MR. WEISSWASSER: I'm going to object to that and ask that it be stricken; calls for this witness testifying to the operation of Messina's mind.

THE COURT: Yes, I think it is objectionable.

1 sitting with Mr. Wean for a couple of hours while he was being
2 processed on the date of the arrest?

3 A That's correct.

4 Q That is after you had come with Mr. Wean over
5 to the U.S. Magistrate's office for Mr. Wean's arraignment?

6 A I believe I was at that arraignment.

7 Q It was certainly after spending several hours
8 in close proximity of Mr. Wean as opposed to seeing someone
9 pass by in the street?

10 A That's right.

11 Q At that point you used what words?

12 A Dark blond.

13 Q How did you describe Mr. Wean with regard to
14 height and weight?

15 A From the report or memory?

16 Q From your report. That report was made a
17 couple of days after the arrest, is that right?

18 A Right.

19 Q Is there anything you doubt in that report?

20 A No.

21 Q What description did you give?

22 A Six feet one, 280 pounds.

23 Q Did you have occasion to look at Mr. Wean's
24 driver's license at that time?
25

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

THE UNITED STATES OF AMERICA,

Plaintiff,

v.

RAYMOND DAVID WEAN,

Defendant.

75Cr. 471

NOTICE OF APPEAL

NOTICE IS HEREBY GIVEN that RAYMOND DAVID WEAN Defendant above named, hereby appeals to the UNITED STATES COURT OF APPEALS for the Second Circuit from the judgment of conviction rendered against him in this Court on the 10th day of March, 1977 after a trial by jury resulting in a finding of guilt to the 2nd count of the Indictment, possession of stolen goods (18U.S.C. 645) on or about November 29, 1976; and a sentence of 3 years imposed by the Court, Hon. EDWARD R. NEAHER, presiding; and said defendant appeals from each and every part of said judgment of conviction and sentence thereon, as well as from the whole thereof.

Dated: Brooklyn, New York
March 21, 1977

5/
WEISWASSER & WEISWASSER
32 Court Street
Brooklyn, New York 11201
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TO:

UNITED STATES ATTORNEY FOR THE EASTERN DISTRICT OF NEW YORK
CLERK, UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF
NEW YORK

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